EAT upholds a decision that maintaining an individual's salary indefinitely whilst doing a role which attracts a lower rate of pay is not a reasonable adjustment

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Aleem v E-Act Academy Trust Ltd UKEAT/0100/20/RN

Background facts

1. The claimant was employed as a science teacher on a full-time basis for Crest Academy. In March 2014 she began a period of sickness absence due to mental ill health. She was able to return to work in June 2015, working 4 days per week. However, she was signed off again in November 2015.

2. The claimant raised a grievance about the handling of her absence in February 2016. The same month, she attended an absence review meeting and she accepted an offer to return to work for 3 days a week as a cover supervisor. This role attracted a lower rate of pay. However, it was agreed that she would remain on the same pay that she had received working 4 days a week as a teacher whilst she did a trial period in this new role.

3. In May 2016, the claimant was offered various options going forward: continue in her 3-day/week cover supervisor role until the end of the summer term OR permanently [on the salary that role attracted]; return to 4 days per week as a teacher until the end of the summer term OR permanently. She opted to return to her teacher role 4 days per week until the end of the summer term [presumably to maintain the same salary] and indicated that she wished to proceed with her grievance. The respondent agreed to allow her to remain doing her cover supervisor role for 3 days but to maintain the same pay until her grievance had been determined.

4. A further grievance was raised in June 2016. Whilst some recommendations were made, the grievance was not upheld. However, it was suggested that the 4-day week salary was maintained whilst the options were considered. The claimant appealed the outcome, and her pay was maintained until the outcome in November 2016. The appeal panel decided

that if the claimant continued in her cover supervisor role, she would be paid at the salary for that role. However, she was given the option of returning to a teaching role on teachers' terms.

5. An OH report was obtained in November 2016 which concluded that the claimant was not fit for a full-time teaching role but was fit for a part-time cover supervisor role. The claimant continued in the cover supervisor role but on lower pay. In July 2017 she asked if she could return to a 4-day teaching role, which was supported by OH. However, the respondent indicated that there were no vacancies.

The decision of the ET

6. The claimant brought various claims of disability discrimination, the pertinent one in the appeal being a failure to make reasonable adjustments. The PCPs relied upon were the requirements to work 4 days a week as a science teacher, or as a cover supervisor at the lower rate. One of the adjustments suggested was allowing the claimant to work as a cover supervisor at the teacher rate. The tribunal concluded that this was not a reasonable adjustment, taking into account the decisions in O'Hanlon v Commissioners for HM Revenue and Customs [2007] IRLR 404 and G4S Cash Solutions (UK) Limited v Powell UKEAT/0243/15. They took into account the fact that the respondent was a publicly funded educational establishment experiencing financial difficulties and found that paying the claimant indefinitely at the higher rate was not reasonable.

7. The claimant appealed this decision, arguing that the ET had erred as the respondent had not demonstrated that they could not afford to pay the higher salary inter alia. The EAT stayed the appeal to enable the claimant to firstly apply for a reconsideration, which she did. However, this application failed and the claimant initiated a second appeal.

Decision of the EAT

8. The EAT considered case law in which the issue as to whether increased sick pay constituted a reasonable adjustment. In O'Hanlon a disabled employee was on long-term sick leave, and after 6 months her pay was reduced by half. It was argued that it would be a reasonable adjustment to allow her to remain on full pay. The EAT disagreed, holding that it would be a very rare case in which such an adjustment would be reasonable and would require exceptional circumstances. It was held that "*the purpose of the legislation is to assist the disabled to obtain employment and to integrate them into the workforce*" and it was not "*simply to put more money into the wage packet of the disabled*" but to "*enable*

them to play a full part in the world of work." This decision was upheld by the Court of Appeal.

9. Consideration was also given to the G4S case, in which a disabled employee returned to work in a new role but with his old (higher) pay rate maintained. The Tribunal found that he was led to believe that the new arrangement was long-term. Some months later, following a review, the respondent ultimately concluded that it could only keep the employee on in the new role permanently at a lower rate of pay. The Tribunal held that it was a reasonable adjustment to continue to maintain the previous rate. The EAT could see no reason *in principle* why that could not amount to a reasonable adjustment. Nothing in O'Hanlon ruled that out as wrong in principle.

10. One of the arguments put forward by the claimant was that there was no suggestion that the respondent could not afford to maintain her full salary. The respondent argued that it had never been their case that they could not afford to pay the increased salary; rather that it was not reasonable to expect them to do so. A relevant factor was that it would cost a substantial amount of money to pay the increased salary and pension contributions until retirement, perhaps in the 6 figures.

11. The EAT upheld the decision of the ET. They found that it was permissible for the ET to take into account that:

    - The respondent was providing publicly- funded education;
    - There were problems with standards of teaching in a subject for which it was already hard to recruit;
    - The respondent was facing financial difficulties;
    - The respondent had already made the adjustment of maintaining the higher rate of pay during the period when the claimant had been trialling the new role.

12. The ET had considered that whilst it was reasonable to maintain the claimant's pay as a way to support her to get back to work [it initially being the case that it was not clear if she could return to her substantive role], those arguments no longer held good after November 2016 [when the medical evidence was that she was not fit to return to a full-time teaching role]. The EAT considered that what the tribunal had to decide was whether, in light of the fact that there had been a trial period of maintaining the pay whilst trying out the cover supervisor role and an OH conclusion that she was not fit to return to her previous role, it was incumbent on the respondent to maintain her on teachers' rates as a reasonable

adjustment. The fact that it had been a reasonable adjustment to do so previously did not show that it would be a reasonable adjustment going forward.

13. In relation to the costs argument, the EAT found that [para 80]:

    It is not the law that, in a situation like this, a respondent can only resist a claim that the old pay rate should be maintained as a reasonable adjustment, if it can show impecuniosity or at least some kind of serious financial difficulty. The Tribunal is entitled to have regard to the actual or likely cost. The exercise of weighing cost alongside other factors is an inherently imprecise one, and its industrial judgment must be accorded a wide margin of appreciation.

14. It was concluded that the finding that it was not reasonable to maintain the higher pay going forward was a wholly proper conclusion. The fact that in G4S the EAT considered that the tribunal did not err in concluding that it was a reasonable adjustment to maintain full pay *on the facts* did not point to the conclusion that in this case the tribunal had erred in finding that it was not a reasonable adjustment to do so. A striking difference between the cases is that in G4S the claimant had been led to believe that preservation of his pay was indefinite, whereas in this case it had been made clear throughout that this was only a temporary measure. There was nothing particularly exceptional about this case (applying the O'Hanlon guidance).

Commentary

15. A helpful case for employers which reiterates the fact that it will rarely be the case that it would be a reasonable adjustment for an employer to have to pay a disabled employee at a higher rate than the job they are able to do attracts. The purpose of the duty to make reasonable adjustments is to assist an employee remaining in employment or returning to work after a period of absence. If an employer does decide to maintain a salary whilst investigating the way forward, it is imperative that it is made clear to the individual that this is only a temporary measure as if this is not made clear, this would be a relevant factor in determining the reasonableness of maintaining the measure indefinitely.

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